85-1169

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,

Petitioners,

vs.

TERRE DU LAC ASSOCIATION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a corporation has standing to assert a fraud-based claim under the Racketeering Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. §1961 et seq., when no defendant is alleged to have made any misrepresentations to the corporation, and the corporation took no action in reliance on such alleged misrepresentations.

2. Whether a corporation has standing to sue under RICO, when the injury allegedly sustained by the corporation is purely derivative of injuries allegedly sustained by its members/shareholders.

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TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,

Petitioners,

vs.

TERRE DU LAC ASSOCIATION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Terre Du Lac, Inc., Terre Du Lac Golf & Country Club, Inc., Terre Du Lac Country Club Association, a limited partnership, C.I.T. Corporation, Sensibar Enterprises, Inc., MO-ILL, Ltd., and James O. Kwon respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 6, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 772 F.2d 467. The opinion of the District Court is reported at 601 F.Supp. 257.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 6, 1985. A timely petition for rehearing or for rehearing en banc was denied on October 14, 1985, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§1961-1964

18 U.S.C. §1341

STATEMENT OF THE CASE

This action concerns the Terre Du Lac subdivision, a private recreational land development located in southern Missouri. Plaintiff is the Terre Du Lac Association, Inc. ("Association") a not-for-profit Missouri corporation. The members/shareholders of the association are the property owners in the Terre Du Lac subdivision; membership in the Association is a condition of ownership of property in the subdivision.

Counts I through VI of the First Amended Complaint (the "Complaint") alleged violations of the Interstate Land Sales Full Disclosure Act, ("Land Sales Act") 15 U.S.C. §1701 et seq. In these counts, the Association sought to sue on behalf of its members for injuries allegedly sustained by its members. The District Court dismissed these counts on the basis that the Association lacked standing to assert the rights of its members, and the Court of Appeals affirmed. The Association also asserted eight pendent state law claims, essentially similar to the Land Sales Act claims. The Court of Appeals vacated the District Court's dismissal of these claims, and remanded with

instructions to reconsider in light of the Court of Appeals' holding on the RICO count.[1]

In Count XV, the Association purported to assert a RICO claim on its own behalf. The Complaint alleged that each defendant was an "enterprise" within the meaning of 18 U.S.C. §1961(4), and that defendants had formed another such "enterprise" by associating together for the purpose of marketing lots in the subdivision. Complaint ¶¶121-22; 125.

The Complaint alleged a pattern of racketeering activity in the form of allegedly fraudulent misrepresentation in violation of 18 U.S.C. §1341. Complaint ¶129. Specifically, the Complaint alleged that defendants misrepresented to prospective purchasers the Developer's intention to pave subdivision roads with asphalt; to complete sewage disposal and water systems; and to transfer to the Association other amenities of the development. Complaint ¶128(a).

The Association alleged that these acts violated 18 U.S.C. §1962(a) and (c), and that the failure to complete the subdivision, as represented, caused injury to the Association, in that:

a. The cost of maintaining unimproved roads is higher than the cost of maintaining improved roads;

b. Defendants have diverted proceeds from the sale of lots to their own operations, rather than using those monies to improve subdivision roads and infrastructure; and

c. The alleged scheme caused more lots to be sold, resulting in more roads and greater usage of the roads which the Association must maintain. Complaint ¶134-136.

---

[1] After the District Court's ruling, the Association filed its pendent claims in state court. Those claims are currently pending in state court.

The Complaint does *not* allege that the purported misrepresentations were made to the Association, or that the Association took any action in reliance thereon. Nor does the Complaint allege that the "injury" to the Association was anything but derivative of the injuries directly sustained by its members. On the contrary, the Complaint specifically alleges that the Association has obtained the funds necessary to maintain the roads and common facilities, by means of additional levies on its individual members. Complaint ¶137(a).

The Court of Appeals held that these pleading deficiencies were not fatal to the RICO count. The Court of Appeals held that a corporate plaintiff has standing to sue under RICO, even if alleged misrepresentations were directed solely to its shareholders, and even if the corporation alleges only that it suffers "indirect injury" derivative of direct injury to its shareholders. In so ruling, the Court of Appeals overlooked the directly contrary holding of the United States Court of Appeals of the Sixth Circuit in *Warren v. Manufacturers National Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985). The Court of Appeals also ignored long-established principles of corporate standing law which prohibit shareholders from suing for injuries to the corporation, and corporations from suing for injuries to their shareholders.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant And Recurring Questions Concerning The Scope And Use Of Civil RICO, 18 U.S.C. §1961 et seq.

In its opinion last term in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. ____, 87 L.Ed.2d. 346 (1985), this Court recognized the " 'extraordinary' uses to which civil RICO has been put," 87 L.Ed.2d. at 361, and noted the "proliferation of civil RICO litigation..." 87 L.Ed.2d. at 352. A bare majority of this Court concluded, however, that the requirements imposed by the Second Circuit in *Sedima* were not an effective or appropriate response to the misuse of civil RICO. 87 L.Ed.2d at 361.

The opinion below marks an expansion of civil RICO well beyond the bounds envisioned by even the most enthusiastic of its advocates. First, the Court of Appeals has eliminated the element of reliance in a fraud-based RICO claim. No defendant is alleged to have made any misrepresentations to the Association — only to Association members. The Association itself took *no* action whatever in reliance upon any such misrepresentations — only its members allegedly did so.

Under the Court of Appeals' definition of "indirect injury," therefore, detrimental reliance is not an element of a RICO fraud claim. An individual who is not even a party to a transaction has a treble damage remedy for any injury which he may sustain as an "indirect" result of any transaction which he can characterize as "fraudulent".

Second, the opinion below emasculates well-settled rules governing corporate standing. In general, a shareholder may not seek redress in his own name for an injury directly sustained by the corporation; conversely, a corporation may not seek redress in its name for an injury directly sustained by its shareholders. See generally, 9 Fletcher Cyclopedia Corporations, §4469. The opinion below rejects these long-standing principles in the RICO context.

Under this unbridled expansion of the civil RICO provisions, a corporate shareholder may file a RICO claim for injuries directly sustained by the corporation, irrespective of the safeguards of Rule 23.1, Fed. R. Civ. P. Conversely, a corporation may suffer "indirect injury," because one of its shareholders lacks the financial wherewithal to infuse new cash into the business. If the member/shareholder's financial embarrassment can, in some fashion, be tied to a RICO violation, the corporation has a federal cause of action for treble damages:

> "Allowing every shareholder, employee and creditor a cause of action for injuries derivative of those suffered directly by a corporation does not just permit a vast amount of litigation to be brought in federal court that previously could only have been brought in state court, but creates a potential avalanche of suits that previously could not have been brought *at all.*"

Warren v. Manufacturers National Bank of Detroit, 759 F.2d 542, 545 (6th Cir. 1985) (emphasis original).

The instant case virtually begs this Court to establish outer boundaries to the scope of civil RICO.

II. The Decision Below Directly Conflicts With The Decision Of The United States Court Of Appeals For The Sixth Circuit Concerning The Applicability Of Corporate Standing Principles To Civil RICO.

The decision below permits a corporation to sue under RICO, even though the corporation's shareholders were the only target of the alleged RICO violation, and even though injury to the corporation is purely derivative of alleged injury to its shareholders. Such holding conflicts directly with that of the Sixth Circuit in *Warren v. Manufacturers National Bank of Detroit,* 759 F.2d 542 (6th Cir. 1985).

In *Warren,* plaintiff was the sole shareholder of Paragon Steel Corporation. Plaintiff alleged that Paragon was forced into

bankruptcy as a result of a RICO violation by the defendant bank. Plaintiff's alleged injury was that his stock became worthless as a result of Paragon's bankruptcy.

The Sixth Circuit relied on "basic principles of the law of corporations" to conclude that plaintiff did not have standing to sue under RICO:

> "In his capacity as a shareholder of Paragon, any injury he incurred was actually one sustained by the corporation.
>
> " 'An action to redress injuries to a corporation cannot be maintained by a shareholder in his own name but must be brought in the name of the corporation. The shareholder's rights are merely derivative and can be asserted only through the corporation... diminution in value of the corporate assets is insufficient direct harm to give the shareholder standing to sue in his own right.' "

759 F.2d at 544, quoting *Stevens v. Lowder,* 643 F.2d 1078, 1080 (5th Cir. 1981).

The Sixth Circuit's opinion in *Warren* is incompatible with the ruling below. The injury allegedly sustained by the Association is purely derivative from the injuries which its member/shareholders have allegedly sustained. The corporation itself has sustained no economic loss as a result of the allegedly fraudulent scheme; only its members have done so. *Warren* retains traditional principles of corporation standing in civil RICO; the Eighth Circuit has discarded them.

Second, *Warren* is incompatible with the Eighth Circuit's concept of "indirect injury." In *Warren,* plaintiff alleged that the RICO violation injured his business or property because he lost his lucrative employment with Paragon. The Sixth Circuit rejected that claim:

> "The alleged acts of fraud were directed not toward plaintiff as an employee of Paragon, but rather were directed to

> Paragon as a corporate entity or person. Assuming the truth of plaintiff's claim, the fraudulent misrepresentation was made to Paragon, not to any individual as such. Any injury Warren suffered as a result of this fraud, here his lost employment, was merely incidental to the corporation's injury...."

759 F.2d at 544-45.

Under the Sixth Circuit rule, a RICO plaintiff alleging mail fraud as a predicate act must allege and prove that he took action, to his detriment, in reliance upon misrepresentations directed to him. In the instant case, the Eighth Circuit has squarely held that no such pleading or proof is necessary.

These issues are a frequent and growing concern of the federal courts. In November, 1985, for example, the Seventh Circuit considered essentially the same issue from the perspective of a taxpayer seeking redress for fraud on the taxing authority. *Carter v. Berger,* No. 85-1384 (7th Cir. Nov 14, 1985). *See also, Gallagher v. Canon U.S.A., Inc.,* 588 F.Supp. 108 (N.D. Ill. 1984); *Levey v. E. Stewart Mitchell, Inc.,* 585 F. Supp. 1030 (D. Md. 1984).

This direct conflict concerning the proper interpretation of civil RICO highlights the confusion generated by the statute and underscores the need for review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 84-2296

Terre Du Lac Association, Inc.,
a not-for-profit corporation,
Appellant,

v.

Terre Du Lac, Inc., Terre Du Lac Utilities Corp., Terre Du Lac Golf and Country Club, Inc., Terre Du Lac Country Club Association, a limited partnership, CIT Corporation, Sensibar Enterprises, Inc., Moill, Ltd. and James O. Kwon,
Appellees.

Submitted April 12, 1985.

Decided Sept. 9, 1985.

Kenton E. Knickmeyer, St. Louis, Mo., for appellant.

John W. Reid, Fredericktown, Mo., and Mark Arnold, St. Louis, Mo., for appellee.

Before ROSS and JOHN R. GIBSON, Circuit Judges, and COLLINSON,* District Judge.

ROSS, Circuit Judge.

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* The HONORABLE WILLIAM R. COLLINSON, Senior Judge, United States District Court for the Eastern and Western Districts of Missouri, sitting by designation.

This case involves an action filed by Terre Du Lac Association, Inc. (Association), a property owners' association, against Terre Du Lac, Inc. and other alleged developers of the Terre Du Lac Subdivision. The Terre Du Lac Subdivision is a private recreational land development area located in southeastern Missouri.

The Association's complaint included sixteen counts. Counts one through six were based on the Interstate Land Sales Full Disclosure Act (Land Sales Act), 15 U.S.C. §§ 1701-1720; counts seven through fourteen were based on pendent state law claims; count fifteen was based on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968; and count sixteen was based on the Sherman Antitrust Act, 15 U.S.C. §§ 1-7. Prior to trial, the defendants filed motions to dismiss all counts of the complaint. The district court granted the motions and the Association now appeals. We affirm the dismissal of the Land Sales Act counts, reverse the dismissal of the RICO and antitrust counts, and vacate the dismissal of the pendent state law counts.

DISCUSSION

1. Land Sales Act — Associational Standing

Counts one through six of the Association's complaint alleged that the defendants violated the Land Sales Act by failing to fulfill the following promises and representations: 1) that the roads in the development would be paved with asphalt, 2) that the sewage disposal and water systems would be completed, 3) that all members of the Association could use certain amenities in the subdivision for free (e.g., golf courses and club house), and 4) that these amenities would be conveyed to the Association upon completion. In particular, count one alleged a violation of 15 U.S.C. § 1703(a)(2)(A), count two alleged a violation of 15 U.S.C. § 1703(a)(2)(B),[1] count three alleged a violation of

[1] Count two actually cited 15 U.S.C. § 1703(a)(2)(D) as the statutory subsection which was violated by defendants' conduct. It is clear

15 U.S.C. § 1703(a)(1)(C),[2] count four alleged a violation of 15 U.S.C. § 1703(a)(2)(C), count five alleged a violation of 15 U.S.C. § 1703(a)(2)(D), and count six alleged that defendant CIT Corporation aided and abetted the other developers in each of these violations. These statutory sections provide that:

> (a) it shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—
>
> (1) with respect to the sale or lease of any lot not exempt under section 1702 of this title—
>
> * * * * * *
>
> (C) to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1704 through 1707 of this title or any regulations thereunder; or
>
> * * * * * *
>
> (2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702(a) of this title—

---

from the factual allegations in count two, however, that the Association intended to cite 15 U.S.C. § 1703(a)(2)(*B*), so we shall treat the complaint as though it cited section 1703(a)(2)(B). *See* FED.R.CIV.P. 8(f) ("pleadings shall be construed as to do substantial justice").

[2] Count three actually cited 15 U.S.C. § 1703(a)(2)(C) as the statutory subsection which was violated by defendants' conduct. It is clear from the factual allegations in count three, however, that the Association intended to cite 15 U.S.C. § 1703(a)(1)(C), so we shall treat the complaint as though it cited section 1703(a)(1)(C). *See* FED.R.CIV.P. 8(f); *supra* note 1.

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser; or

(D) to represent that roads, sewers, water, gas, or electric service, or recreational amenities will be provided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed.

15 U.S.C. §§ 1703(a)(1)(C), (2)(A)-(D). As relief for the defendants' violation of these provisions, the Association sought specific performance of the unfulfilled representations, plus other appropriate relief. The Land Sales Act provision authorizing such relief provides as follows:

(a) A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title. *In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable.* In determining such relief the court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair

> market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

15 U.S.C. § 1709(a) (emphasis added). *See also* 15 U.S.C. § 1709(c) (authorizes recovery for interest, court costs, attorneys' fees, appraisers' fees, and travel expenses).

The district court dismissed the Land Sales Act counts on the basis that the Association lacked standing. Initially, the court determined that the Association lacked standing to sue on its *own behalf* since the Association did not allege that the Terre Du Lac Subdivision lots which it owns were purchased from the defendants. The Association does not contest this finding on appeal.

The Association does, however, contest the district court's finding that it lacked associational standing to sue *on behalf of its members* as to the Land Sales Act counts. According to the Association's complaint, every owner of a lot in the Terre Du Lac Subdivision is required to become a member of the Association and, at the time the complaint was filed in this case, there were approximately 4,000 lot owners. Approximately 3,400 of these lot owners are alleged to have purchased their lots from the defendant developers from between sometime before 1969 to the date the complaint was filed. The Association seeks to assert the Land Sales Act claims on behalf of these 3,400 members.

The Supreme Court has

> recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Each of these three requirements for associational standing must be met. *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 690 (8th Cir. 1979).

In this case, the district court found that the Association "fail[ed] to satisfy the third requirement that 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 601 F.Supp. 257, 259 (E.D.Mo. 1984) (*quoting Hunt v. Washington Apple Advertising Commission, supra*, 432 U.S. at 343, 97 S.Ct. at 2441). The court based this conclusion on the facts that: 1) some of the Land Sales Act counts required proof of reliance, which proof would necessitate testimony by individual members and, 2) there was "potential conflict" amongst the members relating to the suit necessitating individual representation of their interests. *Id.* at 259-61.

We agree with the district court's holding that the Association lacks associational standing to assert the Land Sales Act counts, but do not adopt the district court's reasoning. In our view, the Association lacks associational standing due to the fact that the type of relief available under the Land Sales Act, 15 U.S.C. § 1709(a), requires individualized proof of the claims asserted.

Section 1709(a) provides authority for both damages and specific performance remedies. A damages remedy for a Land Sales Act violation would clearly require individualized proof necessitating the individual participation of the Association members. *See Associated General Contractors v. Otter Tail Power Co., supra*, 611 F.2d at 689-90 (associational standing is traditionally denied in section 4 antitrust actions, which seek treble *damages* awards, due to the need for "precise knowledge of the * * * injury to each plaintiff", whereas in section 16 antitrust actions, which seek *injunctive* relief, associational stan-

ding is not denied unless the association is an inappropriate representative for some reason). First, in order to establish a right to relief, the Association would have to submit evidence relating to each purchase of a subdivision lot in order to establish that the purchaser had a viable Land Sales Act claim. Second, in order to establish the amount of relief due, the Association would have to submit evidence relating to the cost and current value of each lot, as well as evidence relating to the amount by which the defendant's Land Sales Act violations diminished this value. Clearly, the need for such individualized proof renders the Association an inappropriate vehicle to bring the Land Sales Act claims of its members.

The Association seeks to avoid the fact that the damage relief available under section 1709(a) cuts against granting associational standing by arguing that specific performance, not damages, is the relief the Association really wants. A right to a specific performance remedy could be established, the Association argues, by mere proof that the defendants made the alleged promises and representations in violation of the Land Sales Act to one or more of its members. Further, the Association argues, no member would have to testify in court since much of the necessary proof could be established with written evidence such as property reports and written advertisements.

We reject the Association's arguments. In order to determine whether a specific performance remedy is appropriate, the court would have to receive substantial evidence relating to the individual claims and damages of memebers of the Association in order for it to determine whether specific performance, as opposed to a damages remedy, would be "fair, just, and equitable." 15 U.S.C. § 1709(a). Further, the fact that much of the proof could be submitted by written rather than testimonial evidence does not help the Association's cause. The Association's argument boils down to the proposition that the rule against granting associational standing where the "participation of individual members" is required in the lawsuit, *Hunt v.*

Washington Apple Advertising Commission, supra, 432 U.S. at 343, 97 S.Ct. at 2441, refers solely to participation in the form of in-court testimony. Such a narrow reading of *Hunt* is unfounded. Associational standing is properly denied where, as here, the need for "individualized proof", *id.* at 344, 97 S.Ct. at 2442 so pervades the claims asserted that the furtherance of the members' interests requires individual representation.

2. RICO—Conviction Requirement and Standing

Like counts one through six, count fifteen of the Association's complaint sought a remedy for the defendants' failure to fulfill their alleged promises and representations relating to the paving of roads, the completion of the sewage and water systems, and the use and transfer of subdivision amenities. Count fifteen, however, sought relief under the RICO Act. The count alleged violations of sections 1962(a) and (c) of the Act, based on predicate acts of mail fraud, *see* 18 U.S.C. §§ 1341, 1961(1)(B), and sought equitable relief pursuant to section 1964(a) of the Act.

The district court dismissed the RICO count on the basis that "none of these defendants have been convicted of any of the alleged predicate acts of mail fraud." *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., supra,* 601 F.Supp. at 261. The court relied solely on *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir.1984), wherein the court determined that a criminal conviction of a predicate act must precede a private civil suit under RICO.

Subsequent to the district court's decision in this case, the Supreme Court reversed the Second Circuit's decision in *Sedima.* The Supreme Court held that a RICO action may proceed without a criminal conviction of a predicate act. *Sedima, S.P.R.L. v. Imrex Co.,* ____ U.S. ____, ____, 105 S.Ct. 3275, 3281-84, ____ L.Ed.2d ____ (1985).

In view of the Supreme Court's decision in *Sedima,* the failure of the Association's complaint to allege prior mail fraud

convictions of the defendants does not render the complaint deficient. Thus, a reversal of the district court's dismissal of the RICO count is required, unless some other fatal defect in the complaint exists.

The defendants argue that such a defect exists in that the complaint fails to allege sufficient facts supporting the Association's standing to pursue the RICO count. On appeal, the Association does not contest the district court's finding that it lacks associational standing to pursue the RICO count *on behalf of its members.* Instead, the Association argues that it may maintain the RICO action on its *own behalf* because the Association itself was injured by the defendants' acts of mail fraud.

The Association alleged in its complaint that the defendants' acts of mail fraud injured the Association by causing the cost of maintaining the roads in the Terre Du Lac Subdivision, which roads the Association is legally obligated to maintain, to increase. The cost allegedly increased because: 1) the defendants invested the money which they obtained from the mail fraud (i.e., proceeds from the sale of lots in the subdivision) in their own operations rather than using the money to improve (i.e., pave with asphalt) the subdivision roads, and 2) the mail fraud scheme caused more lots to be sold, resulting in more roads and greater usage of the roads which are required to be maintained.

The defendants argue that these allegations of injury are not sufficient to establish the Association's standing since the Association does not allege that it was the target of the alleged mail fraud and since the alleged injury is only indirectly related to the mail fraud. The defendants also argue that the alleged injury is in reality nothing more than injury to the Association's members since the Association will pay for the increased costs of road maintenance by merely allocating a larger share of the members' association dues to cover such costs.

This court has previously held that standing to pursue a RICO action exists even though the plaintiff does not allege that it was

a target of the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury. *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411 nn. 7 & 8 (8th Cir.1984), *vacated and remanded for further consideration in light of Sedima*, ____ U.S. ____, 105 S.Ct. 3551, 87 L.Ed.2d 673 (1985). Our decision in *Alexander Grant* in this respect is consistent with the Supreme Court's decision in *Sedima*, wherein the Court stated:

> *the plaintiff only has standing if,* and can only recover to the extent that, *he has been injured in his business or property by the conduct constituting the violation.* As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd, ___ U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437.
>
> *But the statute requires no more than this.* Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Sedima, S.P.R.L. v. Imrex Co., supra. ____ U.S. at ____, 105 S.Ct. at 3285-86 (emphasis added, footnote omitted).[3] Further,

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[3] On remand from the Supreme Court's vacation of our judgment in *Alexander Grant* we stated: "the approach of the Supreme Court [in *Sedima*] but underscores our conclusion that Grant has standing to

we find no support for the defendants' argument that the Association lacks standing merely because it may pass its alleged injuries on to its members. Thus, we hold that the Association's complaint alleges sufficient injury to support its standing to pursue its RICO action.

3. Antitrust—Tying

Count sixteen of the Association's complaint alleged that the defendants are engaging in unlawful tying in violation of the antitrust laws. This count challenges the defendants' practice of requiring lot owners to pay a $3,000 initiation fee to join the Terre Du Lac Golf and Country Club if they purchased their lot from someone other than the defendants, while offering free memberships to the club to persons who purchase lots from the defendants. The Association sought an injunction against this practice. *See* 15 U.S.C. § 26.

"A tying arrangement is defined as the sale or lease of one item (the tying product) on the condition that the buyer or lessee purchase a second item (the tied product) from the same source." *Rosebrough Monument Co. v. Memorial Park Cemetery Association,* 666 F.2d 1130, 1140 (8th Cir. 1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982). The Supreme Court recently explained that

> the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have

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assert its claims. *See Sedima,* [____ U.S. at ____ n. 15, 105 S.Ct. at 3286 n. 15,]. We find nothing in our discussion in Point I of our earlier opinion, 742 F.2d at 411-12, in conflict with the opinions of the Supreme Court in either *Sedima* or *American National [Bank & Trust Co. of Chicago v. Haroco,* ____ U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985); * * *." *Alexander Grant & Co. v. Tiffany Industries, Inc.,* 770 F.2d 717, 719 (8th Cir.1985) (on remand) (footnote omitted).

> preferred to purchase elsewhere on different terms. When such "*forcing*" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, ____, 104 S.Ct. 1551, 1558, 80 L.Ed.2d 2 (1984) (emphasis added).

Here, the Association argues that the "tying" product is the club memberships, while the "tied' product is the subdivision lots. The Association claims that prospective purchasers will buy lots from the defendants, as opposed to other lot owners, because only the defendants can offer free club memberships.[4] Thus, the Association asserts, the defendants are given an unfair and unlawful competitive advantage in selling lots in the subdivision.

The district court concluded that the Association's complaint "failed to state a claim for which relief could be granted under the antitrust laws" because "[p]urchasers are not *required* to buy golf club memberships in order to buy land in the subdivision, nor are they *required* to buy land from the defendants in order to purchase golf club memberships." *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., supra,* 601 F.Supp. at 261-62 (emphasis added). The Association argues that the court erred in reaching this decision since purchasers of golf club memberships *are* required, by the economic coercion inherent in the defendants' initiation fee arrangement, to buy a lot from the defendants, even though they "might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hospital District No. 2 v. Hyde, supra,* 466 U.S. at ____, 104 S.Ct. at 1558.

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[4] All lot owners can join the golf and country club, regardless of who the lot was purchased from. But those who do not own a lot in the subdivision cannot join at any price. Thus, in order to join the club, a lot must be purchased from somebody.

In reviewing the district court's decision to dismiss the Association's antitrust action for failure to state a claim, we are governed by the following standards:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> * * * * * *
>
> *[A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances,* for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that give rise to a legal basis for recovery. Finally, a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings.
>
> The question, therefore, is whether in the light most favorable to the plaintiff, the complaint states any valid claim for relief.

Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 787 (8th Cir.1979) (emphasis added) (*quoting Jackson Sawmill Co. v. United States,* 580 F.2d 302, 306 (8th Cir.1978), *cert. denied,* 439 U.S. 1070, 99 S.Ct. 839, 59 L.Ed.2d 35 (1979)). After considering the district court's decision in light of these standards, we conclude that the court erred in dismissing the Association's antitrust claim.

The district court's determination that the Association failed to state a cognizable antitrust claim can be explained as being based, in part, on the fact that the factual allegations made by the Association in this case do not mirror the facts underlying

the traditional tying case. In contrast to the traditional tying arrangement, there is no "sale" of the tying product (club memberships) to allegedly coerced buyers here, since the tying product is offered free of charge to such buyers. *See Brown Shoe Co. v. Federal Trade Commission,* 339 F.2d 45, 53, 54 (8th Cir.1964), *rev'd,* 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966). Further, this no cost feature of the tying product is the chief attraction of the tying product which allegedly provides the leverage for sales of the tied product (defendants' subdivision lots). Traditional tying arrangements, in contrast, rely on the desirability or dominant market position of the tying product to coerce sales of the tied product. *See generally Jefferson Parish Hospital District No. 2 v. Hyde, supra,* 466 U.S at ____, 104 S.Ct. at 1560-61.

Yet the evil which is allegedly generated by the defendants' initiation fee arrangement is the same as that generated by traditional unlawful tying arrangements — competition in the market for one product is restrained due to the seller's exploitation of its control over another product. *See id.* at ____, 104 S.Ct. at 1558-59. Thus, even though a proper tying claim was not alleged in the Association's complaint, the factual allegations made in the complaint may support a conclusion that the defendants' initiation fee arrangement constitutes an unreasonable "restraint of trade", 15 U.S.C. § 1, in violation of the antitrust laws, *with the Association's tying argument serving only as an analogy* for analyzing the lawfulness of the defendants' initiation fee arrangement. *See Federal Trade Commission v. Brown Shoe Co., supra,* 384 U.S. at 321, 86 S.Ct. at 1504 (there was no "sale" of the tying product and the chief attraction of the tying product was its no cost feature, yet the Supreme Court stated that the arrangement violated the policy of the antitrust laws and held that the arrangement was an unfair trade practice under Section 5 of the Federal Trade Commission Act); 2 R. Callmann, *Unfair Competition, Trademarks and Monopolies,* § 10.18 at 107-08 (4th ed. 1982) (use of tying arrangement as an

analogy). Accordingly, we reverse the dismissal of count sixteen of the Association's complaint.

4. Pendent State Law Claims

Counts seven through fourteen of the Association's complaint raised various state law claims premised upon breach of contract and fraud theories. The district court dismissed these claims without prejudice. This decision was proper in this case in light of the court's early dismissal of all of the federal claims. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Koke v. Stifel, Nicolaus & Co.,* 620 F.2d 1340, 1346 (8th Cir.1980). On appeal, however, we have reversed the dismissal of two of the federal claims. Accordingly, we vacate the dismissal of the state law claims and remand so that the court may reconsider its decision whether to hear the state law claims in view of our decision on appeal.

CONCLUSION

We affirm the dismissal of the Land Sales Act claims (counts one through six), reverse the dismissal of the RICO (count fifteen) and antitrust claims (count sixteen), vacate the dismissal of the state law claims (counts seven through fourteen), and remand for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2577C(3)

Terre Du Lac Association, Inc.,
Plaintiff,

v.

Terre Du Lac, Inc., et al.,
Defendants.

August 31, 1984

Robert H. Brownlee, Thompson & Mitchell, St. Louis, Mo., for plaintiff.

Donald L. James, St. Louis, Mo., William J. Garmisa, Mitchell S. Goldghen, Nathan H. Lichtenstein, Greenberg, Keele, Lunn & Aronberg, Chicago, Ill., Joseph P. Conran, Maxine I. Lipeles, Dorothy White-Coleman, Husch, Eppenberger, Donohue, Elson & Cornfeld, St. Louis, Mo., John W. Reid, II, Schnapp, Graham & Reid, Fredericktown, Mo., Richard S. Brownlee, III, Jefferson City, Mo., for defendants.

MEMORANDUM

HUNGATE, District Judge.

Numerous pretrial motions are pending in this action, including four motions to dismiss as to which the Court heard oral argument on August 9, 1984. The action is premised upon a sixteen-count complaint arising out of defendants' actions with regard to the sale of land in a particular subdivision.

Initially, and apart from the merits of the pending motions, the court declines to exercise pendent jurisdiction over counts seven through fourteen. With the Court having, as it does, some 360 pending lawsuits, justice and the effective administration of courts are best served by permitting plaintiff's eight pendent counts to be dealt with in state court.[1] As noted by Congressman Neal Smith, Chairman of the House Appropriation Committee's Subcommittee on Commerce, Justice, State and Judiciary, in an interview published in *The Third Branch,* vol. 16, no. 8 (Aug. 1984), the judiciary can alter its own workload to some extent for the purpose of dealing with increasing caseloads. The courts may some day have to cease looking elsewhere for help and examine their own operations and rulings in situations where alternative remedies are available and are adequate to compensate for any injuries sustained.

The court cannot be governed by, but must not be oblivious to, the docket impact of its rulings. For example, district courts face an incipient epidemic of civil RICO treble damage cases. If the present litigation blizzard continues unabated, simply adding judges will not remedy the problems of justice delayed being justice denied. Accordingly, plaintiff's state law claims will be dismissed without prejudice.

Defendants, in their four separate motions to dismiss plaintiff's amended complaint, urge dismissal of each of the remaining eight counts. Counts one through six are based on the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq. (Land Sales Act); count fifteen is based on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.; and

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[1] Anyone who disagrees with this proposition should attempt the formulation of suitable, comprehensible jury instructions for a case with nine parties, eight federal counts, and eight state counts.

count sixteen is based on the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. (Sherman Act).

Plaintiff association purports to sue both on its own behalf and for its members as purchasers in the Terre du Lac subdivision. Essentially, plaintiff's complaint seeks redress for injuries allegedly sustained as a result of unfulfilled promises as to numerous aspects of living in the subdivision. Specifically, plaintiff complains of unfinished roads, water and sewage systems, failure to transfer ownership of various amenities to the association, utility service charges, and use of the country club facilities.

As noted above, counts one through six allege violations of the Land Sales Act, which provides that "[a] purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title." § 1709(a). Clearly, the plaintiff association does not have standing to sue on its own behalf as to these counts, since it does not allege any purchase or lease from defendants. Plaintiff asserts, however, that it has associational standing to represent the claims of its members under these counts. Defendants vigorously contest this assertion.

In *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975), the Court found that an association could have representative standing, even without injury to itself, so long as any one member satisfies the requirement of justiciability and "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensible to proper resolution of the cause...." The requirements for associational standing were further clarified in *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977):

> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

In *Hunt, id.*, a Washington state agency sought to challenge the constitutionality of a North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by only the applicable federal grade or a designation that the apples were not graded. The Supreme Court held that the state agency did have associational standing, noting that "neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context." *Id.* at 344, 97 S.Ct. at 2442.

Assuming, *arguendo*, that plaintiff fulfills the first two *Hunt* requirements for associational standing, the Court finds that plaintiff fails to satisfy the third requirement that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Counts one, two, four, and the portions of count six which incorporate the first three counts, are based on defendants' alleged fraudulent representations and course of business as to plaintiff's members. That being the case, it is clear that each injured party must participate in the lawsuit in order to divulge the extent of the misrepresentation to which the purchaser was exposed.

Plaintiff argues that it can establish the existence and breach of promises without the need of *each* individual member, Memorandum in Opposition to Defendants' Motions to Dismiss Plaintiff's First Amended Complaint at 14, and that so long as this is established as to a sufficient number

of members to justify specific performance, there is no need for individual participation. However, the Court does not agree with plaintiff's apparent contention that the third *Hunt* requirement precludes associational standing only when the nature of the relief sought requires individual participation by each member. Rather, both the relief and the claim must be able to proceed without participation of individual members. Although plaintiff's associational requests for relief do not require such participation, their claims of fraud, upon which the requests for relief are predicated, must each be supported with testimony as to particular fraudulent misrepresentations. This, in turn, requires individual participation by individual members alleging injury. *See, i.e., Harris v. McRae,* 448 U.S. 297, 321, 100 S.Ct. 2671, 2690, 65 L.Ed.2d 784 (1980) (women's group lacked standing to raise free exercise challenge to Hyde Amendment, since free exercise case necessitates showing of coercive effect of enactment as it operates against individual in practice of religion).

This reasoning does not apply to count three or to the portion of count six which charges aiding and abetting as to count three. Count three alleges injury resulting from the issuance of false property reports. To establish defendants' liability for false property reports under the Land Sales Act, "a plaintiff is not required to prove that each purchaser relied in some way on the omission or misrepresentation but only that a material misrepresentation or omission existed in the statement of record at the time the property was sold." *Bryan v. Amrep Corp.*, 429 F.Supp. 313, 317 (S.D.N.Y. 1977). Neither the nature of the claim asserted nor the relief requested requires individual participation.

Nonetheless, the Court finds that plaintiff also lacks standing as to these claims under the reasoning set forth in *Associated General Contractors of North Dakota v. Otter*

Tail Power Co., 611 F.2d 684 (8th Cir. 1979).[2] In that case, a nonprofit association, with both union and nonunion general contractors as members, alleged that an agreement between defendant corporations and numerous labor unions violated antitrust and state labor laws. The Eighth Circuit held that "[t]he association is clearly not in a position to speak for its members.... Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members." *Id.* at 691. The Court stated in support:

> Some members are not qualified and others are not willing to work on the project; some stand to benefit from working on the project under the Agreement and still others will be hurt by not being able to do so.

Id. Significantly, the Court's finding of potential conflict was made despite the fact that the association had voted unanimously to bring the lawsuit, observing that it is the Court's responsibility to determine whether members' interests required individual representation. *Id.*

Here, the Court need not search extensively in order to find potential conflict. Some members, as argued by defendants, may believe that the value of their property is diminished by the very fact of this lawsuit, or may find that it is not in their best interests to have their mandatory dues expended in this fashion. One defendant is also a board member of the plaintiff association.

As noted in *Minnesota Public Interest Research Group v. Selective Service System*, 557 F.Supp. 925, 935 (D.Minn. 1983), the Eighth Circuit "appears fairly ready to find that a diversity

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[2] This reasoning is equally applicable to the Land Sales Act counts disposed of *supra*.

of view necessitates individualized participation, preventing representational standing." In light of the Eighth Circuit's holding, the Court must reject plaintiff's argument for the more liberal approach taken by the Tenth Circuit in *National Collegiate Athletic Association v. Califano,* 622 F.2d 1382 (10th Cir. 1980). Accordingly, all of plaintiff's claims under the Land Sales Act must be dismissed without prejudice to the right of any individual members to seek relief on their own behalf.

Plaintiff's lack of associational standing, as set forth above in regard to its members' claims under the Land Sales Act, also mandates dismissal of its members' claims in counts fifteen and sixteen. In these latter two counts, however, under RICO and the Sherman Act, plaintiff has asserted standing on its own behalf in addition to alleging associational standing. The Court, therefore, addresses plaintiff's claims under these counts separately.

As to plaintiff's RICO count, the Court will sustain defendants' motions to dismiss for the reason that none of the named defendants have been criminally convicted of any of the predicate acts listed in RICO.[3] The "pattern of racketeering activity" alleged by plaintiff consists of mail fraud, in that defendants are charged with mailing false property reports, and false representations to potential purchasers, and receiving checks from purchasers through the mail. However, as conceded orally by counsel for plaintiff, none of these defendants have been convicted of any of the alleged predicate acts of mail fraud.

In a recent and well-reasoned decision, the Second Circuit has determined that criminal conviction of a predicate act must precede a private civil suit under RICO. *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir. 1984). In *Sedima,* the

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[3] The determination whether a prior criminal conviction is a prerequisite to a civil RICO recovery was left open in the recent case of *Alexander Grant and Company v. Tiffany Industries, Inc.,* 742 F.2d 408 (8th Cir. 1984).

distinguished Second Circuit examined the statute itself, its legisiative history, and previous case law; all of which, it concluded, suggest the necessity of restricting the availability of RICO's civil penalties to those persons whose potential defendant(s) have been found criminally guilty of committing a predicate act. Otherwise, RICO would "permit defendants in every 'garden-variety' fraud or securities violation case to be stigmatized as 'racketeers,' on the basis of a preponderance of the evidence...." *Id.*, at 503.

To find otherwise would also allow treble damages to be awarded on only a preponderance of the evidence, and would further have a severe effect on the court's dockets.

The Court also finds plaintiff's antitrust claim on its own behalf to be without merit. In count sixteen, plaintiff alleges that defendants are violating antitrust law by way of an illegal tie-in arrangement between golf memberships in the Terre du Lac Golf and Country Club and lots offered for sale by defendants in the subdivision. Plaintiff complains of defendants' practice of waiving the membership initiation fee for persons whose lot is purchased from defendants, whereas those persons who purchase lots from anyone else and desire to obtain a golf membership must pay a substantial initiation fee. Plaintiff alleges that this practice precludes sellers from obtaining the fair market value of their lots.

In arguing the merits of defendants' motions to dismiss, all parties rely on the recently decided case of *Jefferson Parish Hospital District No. 2 v. Hyde,* ____ U.S. ____, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). As noted therein, "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id.* at 1558.

The Court agrees with defendants that no such tying is alleged by plaintiff's complaint, and that plaintiff has failed to state a claim for which relief could be granted under the antitrust laws. Purchasers are not required to buy golf club memberships in order to buy land in the subdivision, nor are they required to buy land from the defendants in order to purchase golf club memberships. Accordingly, the Court finds that count sixteen must be dismissed.

Also pending in this action is a motion to intervene as defendant by the Missouri Public Service Commission and a motion to vacate the Court's August 9, 1984, protective order. Because this order dismisses plaintiff's complaint in its entirety, those motions are moot.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the Court declines to exercise pendent jurisdiction as to Counts VII through XIV, and those counts are dismissed without prejudice.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendants Terre du Lac, Inc., and James O. Kwon be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendant CIT Corporation be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendants Terre du Lac Golf and Country Club, Inc., Terre du Lac Country Club Associates, Sensibar Enterprises, Inc., and Moill, Ltd., be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to intervene filed by the Missouri Public Service Commission be and the same is denied as moot.

IT IS HEREBY FURTHER ORDERED that the motion to vacate the protective order entered August 9, 1984, be and the same is denied as moot.

APPENDIX C

STATUTES INVOLVED

18 U.S.C. §1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.] —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code [18 USCS §§ 1 et seq.]: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contra-

band cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 [11 USCS §§ 1 et seq.], fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4)"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law,

where the usurious rate is at least twice the enforceable rate;
(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];
(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];
(9) "documentary material" includes any book, paper, document, record, recording, or other material; and
(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465.)

(As amended, Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465; Nov. 6, 1978, P. L. 95-598, Title III, § 314(g); 92 Stat. 2677; Oct. 12, 1984, P. L. 98-473, Title II, Ch IX, § 901(g), Ch X, Part N, § 1020, 98 Stat. 2136, 2143; Oct. 25, 1984, P. L. 98-547, Title II, § 205(l), (2), 98 Stat. 2770.)

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962 [18 USCS § 1962];

(2) any —

(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962]; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 [18 USCS § 1962].

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) [Repealed]

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter [18 USCS § 1962] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of

forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence [28 USCS Appx].

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forefeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b) [31 USCS § 3302(b)], the proceeds of any sale or other disposition of property forfeited under this section and

any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter [18 USCS §§ 1961 et seq.], or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter [18 USCS §§ 1961 et seq.];

(2) compromise claims arising under this section.

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter [18 USCS §§ 1961 et seq.]. Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure [USCS Rules of Criminal Procedure, Rule 15].

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(As amended Oct. 12, 1984, P. L. 98-473, Title II, Ch III, Part A, § 302, Ch XXIII, § 2301(a)-(c), 98 Stat. 2040, 2192.)

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

(As amended Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(24)(A), 98 Stat. 3359)

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 763; May 24, 1949, ch 139, § 34, 63 Stat. 94; Aug. 12, 1970, P.L. 91-375, § 6(j)(11), 84 Stat. 778.)

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No. 85-1169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,

Petitioners,

vs.

TERRE DU LAC ASSOCIATION, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 85-1169

IN THE

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OCTOBER TERM, 1985

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,

Petitioners,

vs.

TERRE DU LAC ASSOCIATION, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 1961-1964
18 U.S.C. § 1341
R.S.Mo. §§ 355.030, 105-125, 230

STATEMENT OF THE CASE

This case arises out of the promotion and operation of a private recreational lake-type real estate development. The development, known as Terre Du Lac, occupies over five thousand acres of land in southeastern Missouri.

The development was begun by the Respondent Terre Du Lac, Inc. ("TDL, Inc."). Over the course of time, TDL, Inc. was joined in its venture by the other Respondents (collectively,

the "Developers"), each of whom now have a role or stake in the continuing promotion and/or development of Terre Du Lac.

The Developers have marketed lots in Terre Du Lac using the means and instrumentalities of interstate commerce at prices ranging from five thousand to thirty-five thousand dollars. Approximately four thousand lots in the development have now been sold by the Developers.

Petitioner, Terre Du Lac Association, Inc. (the "Association") is a Missouri not-for-profit corporation. As a matter of law, the Association has no shareholders. *See,* R.S.Mo. § 355.030 (1978). Instead, the Association is composed of members who cannot receive dividends or other distributions of the Association's property. *Id.; see also* R.S.Mo. §§ 355.105-125, 355.230. Pursuant to restrictive covenants contained in deeds to property in Terre Du Lac, each lot owner is required to be a member of the Association. As such, lot owners are obligated to pay assessments levied by the Association.

The Association was created by the developers of Terre Du Lac to own, operate, manage and maintain the roads, facilities, amenities and common areas of the development. Pursuant to its charter and by-laws (both of which were drafted by the developers) the Association is obliged to maintain and operate for its members' benefit such portions of the development as are transferred to the Association by the Developers, and to maintain the roads in the development upon "permanent surfacing" of the roads.

In order to generate funds to fulfill these obligations, the Association levies assessments on its members. The Association uses the monies generated thereby to furnish police and fire protection in Terre Du Lac, and to maintain and operate the roads and other common properties, facilities and amenities that it owns in the development.

In order to promote the sale of lots in Terre Du Lac, the Developers made various promises and representations to prospective purchasers of lots in the development. Among the representations and promises made were statements: (1) that the developers would pave the roads in the development with asphalt over a stabilized base; (2) that the developers would complete the construction of water and sewer systems in the development, and (3) that upon completion of the amenities located in the development, (lakes, a country club, golf courses, picnic areas) the amenities would be transferred, free and clear of encumbrances, to the Association. Many, though not all, of these representations were contained in written property reports that were filed with the U.S. Department of Housing and Urban Development and furnished to purchasers of lots in Terre Du Lac pursuant to the Interstate Land Sales Act, 15 U.S.C. § 1701 *et seq.* ("ILSA") or in written advertisements published by the Developers. Based on these and other similar representations, approximately three thousand four hundred members of the Association purchased lots in the development.[1]

By 1983, it had become clear that the Developers had no intention to fulfill these promises. The Association, therefore, commenced suit against the Developers in the United States District Court for the Eastern District of Missouri to attempt to force the Developers to complete the development in accordance with their promises and representations.

The Association's First Amended Complaint (the "Complaint") alleges that the Developers violated various provisions of the Interstate Land Sales Act, 15 U.S.C. § 1701 *et seq.*, the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961 *et seq.* ("RICO"), the Sherman Act, 15 U.S.C. § 1 *et seq.*, and committed various common law torts and breaches of contract.

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[1] The other members of the Association, approximately six hundred, did not purchase their lots directly from the developers. These members purchased their lots from other persons, whose title to the property is in most instances traceable to the Developers.

The RICO claims asserted in the Complaint fall into two categories. The first category consists of claims for the injuries sustained by the Association itself due to the Developers' RICO violations. The second category consists of claims for the injuries sustained by the Association's members as a result of the Developers' RICO violations. Both categories of claims arise from the same RICO violations.

As detailed in the Complaint, the Developers engaged in a pattern of racketeering activity consisting of various acts of mail fraud to promote the sale of lots in Terre du Lac and reap the benefits from the resulting sales.

Respondents TDL, Inc., Sensibar Enterprises, Inc. ("Sensibar"), and C.I.T. Corporation ("C.I.T.") violated 18 U.S.C. § 1962(a) by investing the proceeds of the racketeering activity — the funds generated by the lot sales — in various enterprises.

TDL, Inc., Sensibar and Kwon violated 18 U.S.C. § 1962(c) by conducting the affairs of an enterprise (defined in the Complaint as the Respondents' venture to promote and operate Terre Du Lac) through the pattern of racketeering activity.

The Developers' RICO violations injured the Association by causing the cost of maintaining the roads and other facilities and areas in Terre Du Lac, which the Association is legally obligated to maintain, to increase. The cost increased because: 1) the Developers invested the money they obtained from the pattern of racketeering activity (i.e., proceeds from the sale of lots in the subdivision) in their own operations, thereby diverting the money from the proper completion of the infrastructure of the development, and 2) the fraudulent promotional scheme caused more lots to be sold, resulting in more roads and facilities and greater usage of the roads and other facilities which are required to be maintained by the Association.

The Developers' RICO violations injured the Association's members because (a) they are subject to levies by the Association to cover the Association's expenses, (b) they paid excessive

prices for their lots in the development, (c) the value of their lots in Terre Du Lac has been adversely affected, (d) they have been deprived of their right to use various amenities in the development, and (e) they have been subjected to excessive utility charges.

The Association is the only named plaintiff in the suit. It sought to pursue its members' claims against the Developers based on the doctrine of associational standing recognized in this Court's decisions in *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977) and *Warth v. Seldin*, 422 U.S. 490 (1975).

The Developers moved to dismiss the Amended Complaint for failure to state a claim upon which relief could be granted. The Developers contended, among other things, that the Association lacked standing to pursue the claims asserted on behalf of the Association's members, and that the complaint failed to allege a "racketeering injury". The District Court agreed with the first contention and found, additionally, that the RICO claims were defective for failure to allege that the Developers had been convicted of the predicate acts of racketeering activity. It therefore dismissed the Complaint.

The Association appealed from the Order of dismissal to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the dismissal of the ILSA claims asserted by the Association on behalf of its members.[2] The Court reversed the dismissal of the RICO claim, holding that in light of this Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed. 2d 346 (1985), the Association's Complaint sufficiently stated a RICO claim.

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[2] The Court of Appeals' opinion specifically addressed the issue of associational standing only as to the ILSA claims. The Court of Appeals erroneously stated that the Association did not contest on appeal the district court's finding that the Association lacked standing to pursue its members' RICO claims.

REASONS FOR DENYING THE WRIT

I. Introduction

The Developers' Petition frames two questions relating to the standing of corporations to sue under the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 *et seq.* ("RICO") that allegedly merit review by this Court. Both questions are alleged to be recurring issues in civil RICO litigation. According to the Developers, the Court of Appeals' resolution of both questions conflicts with the resolution of the same issues by the Court of Appeals for the Sixth Circuit in *Warren v. Manufacturers National Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985). The Developers further contend that both questions are important issues of federal law which have not been, but should be, settled by this Court.

The Association submits that these allegations and contentions are unsupportable.

II. This Case Does Not Present The Broad Questions Of Corporate Standing To Sue Under RICO Asserted By The Developers

The Association agrees that the first question presented for review,

> [w]hether a corporation has standing to assert a fraud-based claim under the Racketeering Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. § 1961 et seq., when no defendant is alleged to have made any misrepresentations to the corporation, and the corporation took no action in reliance on such alleged misrepresentations

raises an important issue of federal law that can be resolved under the facts of this case. However, the Association concurs with the Developers on this point only because under the facts of this case there is subsumed in that question a more narrow one:

whether a not-for-profit corporation whose members have been injured in their property by reason of a violation of 18 U.S.C. § 1962 has standing, under the doctrine of associational standing, to seek relief from those injuries on behalf of its members pursuant to 18 U.S.C. § 1964?

The Association believes that the resolution of this narrow issue by the lower courts in this case conflicts with the decisions of this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 345 (1977) and *Warth v. Seldin*, 422 U.S. 490 (1975). Accordingly, the Association believes that it would be appropriate for the Court to issue a writ of certiorari to the Court of Appeals to review the lower courts' disposition of this sub-issue.[3]

The Association believes, however, that the broader issue of corporate standing to sue under RICO stated in the question posed by Developers is not resolvable under the facts of this case.

Issues of standing must be determined with reference to the identity, status, and legal interests of the party asserting the claim. *See, e.g. Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975). In this case, the identity, status, and legal interests of the plaintiff — the Association — are atypical of the identity, status and legal interests of corporations, generally.

As a not-for-profit corporation, the Association occupies a special niche in the hierarchy of organizations having recognized legal status. Unlike general business corporations, it has no shareholders. R.S.Mo. § 355.030. Instead, the Association has "members" R.S.Mo. § 355.105. It does not exist to generate in-

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[3] The Association is filing, concurrently with this Response to the Developers' Petition, a cross-petition for a writ of certiorari to the Court of Appeals.

come or capital gains for its members. It is prohibited by law from distributing dividends to its members, or anyone other than a successor entity. *See* R.S.Mo. §§ 355.030, 355.230.

In contrast to a general business corporation, the Association has the right to raise revenue (as opposed to capital) by levying assessments against the property (lots in Terre Du Lac) of its members. It has obligations to perform various specific services for its members, such as maintaining and operating the roads and other portions of Terre Du Lac. In these respects, the Association is much more closely analogous to a municipal corporation than to a general business corporation. *Cf. Carter v. Berger,* 777 F.2d 1173 (7th Cir. 1985) (discussing the relative standing of taxpayers and Cook County, Illinois to sue under RICO).

The Association's status and unique attributes and obligations are the features which made it susceptible to and caused it to sustain injury by reason of the Developers' RICO violations in the first place. Any analysis of the Association's standing to sue under RICO will, of necessity, delve into these matters. It is more likely than not that the outcome of any standing issue will turn on these characteristics, rather than on general principles of corporate law or on some matter applicable to corporations, generally.

Thus, contrary to the Developers' contention, this case is not one in which the Court may reasonably expect to establish generally applicable rules relating to corporate standing to sue under RICO.

III. The Circuits Are Not Divided Over The Issue Of Corporate Standing Under RICO

The Developers' contention that the Court of Appeals' decision in this case conflicts with *Warren v. Manufacturers National Bank of Detroit,* 759 F.2d 542 (6th Cir. 1985) rests principally on a skillful but flawed effort to analogize the loss sustained by the plaintiff in *Warren* to the injury inflicted upon the

Association by the Developers in this case. The analogy is flawed because, unlike the plaintiff in *Warren,* the Association's damages are *not* derivative of injuries inflicted upon other persons (the Association's members) by the Developers' violations of RICO. Rather, the Association has suffered separate and independent injuries flowing directly from the Developers' RICO violations.

The Developers' further effort to contrast the results in the two cases based on the respective plaintiff's "reliance" on the defendants' fraudulent representations also fails. Contrary to the Developers' contention, the Sixth Circuit did not hold that reliance is an element of a RICO claim. Had that court so held, it would have improperly added an additional element to a claim for relief under RICO.

A. The Association's RICO claim is not derivative of its' members' injuries.

In *Warren,* the plaintiff ("Warren") was the sole shareholder and an employee of Paragon Steel Corporation ("Paragon"). Paragon borrowed money from the defendant, Manufacturers National Bank of Detroit (the "Bank"). Interest on the loan was pegged to the Bank's "prime rate", an interest rate having a particular definition. Allegedly, the Bank defrauded Paragon by charging (and collecting) interest based on a rate which was substantially in excess of the "prime rate" as defined by the Bank. The excessive interest charges allegedly drove Paragon into bankruptcy. As a consequence of the bankruptcy, Warren's stock in Paragon became worthless, and he lost his employment. 759 F.2d at 543-44.

Warren sued the Bank under RICO based on (a) his investment loss as a shareholder of Paragon and (b) his loss of employment. The Sixth Circuit rejected Warren's contention that his injuries in these respects were different from those inflicted upon Paragon. Instead, it correctly concluded that Warren's losses were derivative of the injuries inflicted upon

Paragon. Applying "basic principles of the law of corporations", the court held that Warren could not sue, individually, for injuries inflicted on the corporation. 759 F.2d at 545.

By contrast, the Association seeks recovery for injuries it sustained and is continuing to sustain because the cost of fulfilling its obligations have been substantially increased as a consequence of the Developers' RICO violations. While these injuries are one major consequence of the fraud perpetrated on the Association's members, they are not derivative of the injuries sustained by the Association's members. Complaint, ¶ 136. The Court of Appeals, therefore, properly upheld the Association's right to seek relief from these injuries under RICO.

The Association's members have their own RICO claims against the Developers. The principal injuries sustained by such members are (1) the increased assessments levied against them by the Association as a consequence of the Association's RICO injujries, (2) diminished value of their investment in their property located in Terre Du Lac, and (3) the increased costs of utility service. Complaint, ¶ 137.

The first injury to the Association's members is one that results from the Association's attempt to pass on its injuries to its members. While the Association's members' claims for this type of injury might be described as derivative of the Association's injury, the Association's injury is certainly not derivative of this injury to its members.[4]

The second and third types of injury sustained by the Association's members are, respectively, (a) an injury to the value of their property — their homes and lots in Terre Du Lac

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[4] A claim was asserted on behalf of the Association's members based on the Associations's injuries that it has attempted to pass on to its members. Whether or not the Association's members could, in a separate suit, recover under RICO for those charges in an issue that, to date, has not arisen. *See* discussion, *infra* at 14-16.

and (b) increased costs of operating their homes. The Association's recovery on its own RICO claims will not in any respect overlap with its members' recovery for these entirely separate and unrelated injuries. The Association has no ownership interest in its members' homes and real estate. The nature and extent of the Association's injury, therefore, is not measured by the losses in property value or utility expenses incurred by its members. Instead, its injury relates solely to its own increased costs of fulfilling its contractual and legal obligations.

The Association's injury, and its claim thereon, would subsist even if its members had not sustained any loss of value to their property, or any charges for utilities. It is apparent, therefore, that the Association's injury is an injury separate from and independent of its member's injuries.

By contrast, under the facts in *Warren,* it is apparent that Warren's claim against the Bank would and could not have subsisted in the absence of the injury inflicted on Paragon. Warren's claims were, in effect, claims for the ripple effect of Paragon's losses resulting from the RICO violation. If Paragon had sustained no economic loss, Warren would have sustained no economic loss, and therefore, would have no claim.

These critical factual differences, rather than the application of conflicting legal principles, give rise to the differing results in *Warren* and this case.

B. Reliance is not an element of a RICO claim arising out of predicate acts of mail fraud.

Because Warren's injuries were clearly derivative of Paragon's, the Sixth Circuit had no need to decide whether "reliance" is an element of a fraud-based RICO claim. Although the court discussed the issue of reliance as an element of a claim for common law fraud, the discussion is in the context of illustrating the fact that Warren's injuries were derivative of Paragon's. *Warren v. Manufacturers National Bank of*

Detroit, 759 F.2d at 545. Notwithstanding the Developers' contrary suggestion, a ruling that reliance is an element of a RICO cause of action is not to be found in the Sixth Circuit's decision.

In fact, reliance has never been an essential element of a "fraud-based" RICO claim. It is well settled, for example, that it is unnecessary to prove reliance on the part of any person in order to prove a defendant guilty of the crime of mail fraud, whether in connection with interstate land sales or in any other context. *See, e.g., U.S. v. Pocono International Corp.,* 378 F.Supp. 1265, 1268 (S.D.N.Y. 1974). Moreover, 18 U.S.C. § 1962 does not mention reliance as an element of any of the offenses proscribed therein, nor does 18 U.S.C. § 1964 list reliance as a prerequisite to recovery for violations of 18 U.S.C. § 1962. In short, decision below did not, as the Developers contend, eliminate the element of reliance from a fraud based RICO claim. *See* Petition at 5. Rather, the Court of Appeals properly refused to engraft onto RICO an additional element. That is precisely what it was obliged to do under *Sedima, S.P.R.L. v. Imrex Co., Inc.,* ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). *See* discussion, *infra* at 13-14.

As the foregoing discussion demonstrates, the decision in *Warren* does not in any way conflict with the Court of Appeals' decision in this case. The Sixth Circuit stated that the corporation, Paragon, could recover its losses sustained as a consequence of RICO violations. It declined, however, to permit shareholders and employees to recover losses derivative of the corporation's injuries. The Eighth Circuit also upheld a corporation's right to recover for injuries it sustained as a consequence of RICO violations. The Eighth Circuit correctly perceived that the corporate losses in this case — those sustained by the Association — were not derivative of its members' injuries, but were proximately caused by the Developers' RICO violations.

IV. This Court Has Already Disposed Of The Issues Raised By The Developer

A. Injuries sustained by reason of a RICO violation are, without more, remediable under 18 U.S.C. § 1964.

The Developers contest the availability to the Association of a remedy under RICO principally because the Association's injuries are separate and distinguishable from the injuries inflicted on the Association's members by the Developers' predicate acts of mail fraud. According to the Developers' view of the statute, a plaintiff must be a "target" of the predicate acts of racketeering activity to recover under RICO. This contention finds no support in the language of the statute and is wholly inconsistent with this Court's decision in *Sedima.*

The relevant portion of the statute states that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1962] may sue therefore in any appropriate United States district court....

18 U.S.C. § 1964(c). This Court has recognized that RICO does not make a defendant's separate, predicate acts of racketeering activity as defined in 18 U.S.C. § 1961(1) specifically actionable. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ____ U.S. at ____, 105 S.Ct. at 3285, 3297, 87 L.Ed.2d at 358, 366. Rather, it makes the conduct proscribed in 18 U.S.C. § 1962 actionable by persons injured in their business or property by reason of that conduct. *Id.* Thus, under the express statutory language, a plaintiff must show an injury proximately caused by the violation of Section 1962, not merely an injury proximately caused by one of the predicate acts that are elements of a pattern of racketeering activity which is, in turn, an element of a violation of Section 1962.

In *Sedima,* the majority of this Court recognized that in some cases, an injury inflicted by reason of a violation of 18 U.S.C. §

1962 will be indistinguishable from the injury inflicted by the predicate acts of racketeering activity. Thus, the Court refused to *restrict* the availability of private civil relief under RICO to those cases in which the plaintiff has sustained a "racketeering injury" — i.e., an injury distinguishable from the injuries that are proximately caused by the defendant's predicate acts of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ____ U.S. at ____, 105 S.Ct. at 3284-87, L.Ed.2d at 357-61. Both the Majority Opinion and the Dissenting Opinions indicate that such a separate "racketeering injury" continues to be remediable in a private civil suit under RICO. *Id.* at ____, 105 S.Ct. at 3286, n.15, 3303, 87 L.Ed.2d at 359, n.15, 375.

The Developers' petition is nothing more than an effort to have the Court reject that principle upon which all members of this Court were in agreement only last term. Since the Court's conclusion on this point is consistent with the unambiguous language of the statute, the "issue" raised by the Developers does not merit further consideration of this Court.

B. Neither the derivative nature of a plaintiff's RICO injuries nor a plaintiff's ability to pass on its RICO injuries to others should preclude its right to recovery under RICO.

The Developers' other proffered question for review, whether a "derivative" injury is compensable under RICO, is not in fact, raised by the facts of this case.[5] *See* discussion, *supra* at 9-11. In their Statement of the Case, however, the Developers have raised a related issue: whether RICO injuries that can be "passed on" to other persons are remediable under 18 U.S.C. § 1964? *See* Petition at 4. That issue, as well, must be resolved against Developers.

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[5] If the "derivative injury" issue were raised, this Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (dealing with derivative claims in an antitrust context) suggests that the issue should be resolved favorably to the Association.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488-94, 88 S.Ct. 2224, 2228-32, 20 L.Ed.2d 1231 (1968), the Court held that a person injured in its business or property by anything forbidden in the antitrust laws had a right to recover the full amount of its damages, trebled, even if it passed on its damages to someone further down the economic chain. In this case, the Developers ask the Court whether the opposite result should obtain under RICO. This issue is raised, they contend, because the Association can recover its losses through assessments of its members.[6]

The Developers' petition does not suggest any reason to depart from the principle of *Hanover Shoe* under RICO. Furthermore, the Developers do not contend that any court has yet done so.[7] Consequently, it appears that the "passing on" issue raised by the Developers is an important issue only because a rejection of *Hanover Shoe* in the RICO context *might* allow the Developers in this case to escape liability for their RICO violations.

Hanover Shoe provides a sound rationale for rejecting a "passing on" defense in a RICO context as well as in the antitrust context in which the case was decided. The mere possibility that the Developers may have a "passing on" defense

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[6] The record in this case does not indicate whether the Association has, in fact, "passed on" its injuries to its members. The Association has levied assessments on its members which, if collected, would effectively pass on its injuries to its members. *See* Complaint, ¶ 137. The record, however, does not show that the assessments that were levied have been collected. Thus, even if "passing on" might be a defense under RICO, its availability in this case cannot be established on the present record.

[7] In fact, the U.S. Court of Appeals for the Seventh Circuit has expressly considered whether the doctrine of *Hanover Shoe* should apply under RICO, and concluded that is should. *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985).

in this case is an insufficient reason for this Court to now consider whether to abandon that rationale under RICO.

CONCLUSION

When the Developers' Petition is considered as a whole, it is apparent that the Developers want the Court to review two aspects of the Court of Appeals' decision.

First, they ask whether the Court of Appeals correctly ruled that a plaintiff suing under 18 U.S.C. § 1964 need not, in addition to the requirements specified in that provision, show that it was a target (and victim) of the defendants' predicate acts of racketeering activity. Second, the Developers question the propriety of the decision insofar as it permits a party to sue under RICO for injuries that it can pass on to other persons.

The Association concedes that these issues are recurring. The issues recur, however, only because defendants faced with liability under RICO persist in their pleas to the courts to limit the breadth of RICO by engrafting artificial standing requirements onto the statute. Such persistence does not give these issues status as important questions of federal law that have not been, but should be settled by this Court. The Court has already held that concerns over the breadth of RICO may properly be addressed by Congress, but not by this Court. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ____ U.S. ____, 105 S.Ct. 3275, 3287, 87 L.Ed.2d 346, 360-61 (1985).

The "conflict" which the Developers claim to have identified between the Court of Appeals' decision in this case and the Sixth Circuit's decision in *Warren v. Manufacturers National Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985) is an illusion created by the Developers' unsubstantiated charge that the Association's injury in this case is derivative of its members' injuries. The illusion disappears when the facts underlying the two decisions are properly analyzed. Both courts reached the same legal conclusion: a corporation can sue under RICO for

injuries it sustains by reason of a violation of 18 U.S.C. § 1962. They reached different results because the injuries alleged in *Warren* were, in fact, derivative of injuries sustained by a corporation, while in this case the Association's injuries are not derivative of its' members' injuries.

Accordingly, unless the Court believes it appropriate to review this case to correct the Court of Appeals' holding on the issue of associational standing, there is no reason for the Court to address the questions presented by the Developers, and the Petition, should be denied.

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APPENDIX

APPENDIX

R.S.Mo. § 355.030. No shares of stock — no dividends except on liquidation. — 1. A corporation shall not have or issue shares of stock.

2. No dividend shall be paid and no part of the income or property of a corporation shall be distributed to its members, directors or officers; provided, however, that a corporation may pay compensation in a reasonable amount to members, officers or directors for services rendered and may make distributions upon dissolution or final liquidation as permitted by this chapter.

R.S.Mo. § 355.105. Members, classes — members unnecessary. — A corporation may have one or more classes of members; but no corporation shall be required to have members, and in lieu of members, may provide only for a self-perpetuating board of directors. The designation of such class or classes and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or the bylaws. A corporation may issue certificates evidencing membership therein.

R.S.Mo. 355.107. Directors or members not liable for corporate debts. — The directors of a corporation and the members of a corporation, if a corporation has members, are not individually or personally liable for the debts, liabilities or obligations of the corporation.

R.S.Mo. 355.110. Meetings of members, when and where held. — Meetings of members, if a corporation has members, may be held at such place or places, either within or without this state, as may be designated in the articles of incorporation or the bylaws or from time to time by resolution or written consent of the members, or by resolution of the board of directors pursuant to authority granted in the bylaws. In the absence of any

such designation, all meetings shall be held at the registered office of the corporation in this state.

(1) An annual meeting of the members shall be held at such time as may be provided in the bylaws. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation.

(2) Special meetings of the members may be called by the president or by the board of directors. Special meetings of the members may also be called by such other officers or persons or number or proportion of members as may be provided in the articles of incorporation or the bylaws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, a special meeting of members may be called by members having one-twentieth of the votes entitled to be cast at such meeting, or, if the number of members entitled to vote at said meeting shall exceed one thousand, by fifty members.

R.S.Mo. § 355.115. Notice of meetings. — Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called shall be delivered not less than five nor more than forty days before the date of the meeting, either personally or by mail, by or at the direction of the president, or the secretary, or the officers or persons calling the meeting, to each member entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the member at his address as it appears on the records of the corporation, with postage thereon prepaid.

355.120. Voting — proxies — cumulative voting. — 1. The right of the members, or of any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

2. A member may vote either in person or if authorized by the bylaws, by proxy executed in writing by the member or by his duly authorized attorney in fact. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail.

3. The articles of incorporation or the bylaws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his vote and to give one candidate a number of votes equal to his vote multiplied by the number of directors to be elected, or to distribute such votes on the same principle among as many candidates as he shall think fit.

R.S.Mo. § 355.125 Quorum — vote necessary for action. — The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members holding one-tenth of the votes entitled to be cast represented in person or, if proxy voting is authorized by the bylaws, by proxy, shall constitute a quorum. The vote of a majority of the votes entitled to be cast by the members present at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members, unless a greater proportion is required by this chapter, the articles of incorporation or the bylaws.

R.S.Mo. § 355.230. Disposition of assets on dissolution — plan of distribution. — The assets of a corporation in the process of dissolution shall be applied and distributed as follows:

(1) All liabilities and obligations of the corporation shall be paid, satisfied and discharged, or adequate provision shall be made therefor.

(2) Assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred or conveyed in accordance with such requirements.

(3) Assets held for a charitable, religious, eleemosynary, benevolent, educational or similar use, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, trusts, societies or other organizations engaged in charitable, religious, eleemosynary, benevolent, educational, or similar activities pursuant to a plan of distribution adopted as provided in this chapter.

(4) Any remaining assets may be distributed to such persons, trusts, societies, organizations or domestic or foreign corporations as may be specified in the articles of incorporation or as may be specified in a plan of distribution adopted as provided in this chapter, providing that no part of the assets shall be distributed to members of the corporation pursuant to such plan unless such distribution is specifically directed by the articles of incorporation, and unless the corporation shall first notify the attorney general of the state in writing of the plan of distribution, at least thirty days prior to such distribution. If it shall appear to the attorney general that such distribution of assets will result in diversion of such assets from not for profit purposes as authorized by this chapter, to the pecuniary gain or profit of any person, organization, or corporation, he shall cause an action to be commenced in any court of competent jurisdiction for adjudgment that all such assets, proposed to be so diverted, shall be paid or delivered to the members or to a person, organization or association engaged in nonprofit activities similar to and most closely analogous to that of the dissolving or liquidating corporation or to the state as the court may direct.

(3)

Supreme Court, U.S.
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No. 85-1169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,

Petitioners,

vs.

TERRE DU LAC ASSOCIATION, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent, Terre du Lac Association, Inc.* submits this Supplemental Brief in Opposition to the Petition for Writ of Certiorari in order to bring to this Court's attention the recent decision of the U.S. Court of Appeals for the Fifth Circuit in *ArmcoIndustrial Credit Corporation v. SLT Warehouse Company,* No. 84-1828 (5th Cir., February 7, 1986).

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* Terre du Lac Association, Inc. has no parent or subsidiary corporations.

Petitioners in this case have asked the Court to decide whether a plaintiff pursuing a remedy for violations of 18 U.S.C. § 1962 must allege that it relied on defendants' fraudulent representations when such representations are elements of the offenses of mail fraud alleged to constitute a pattern of racketeering activity that is alleged as an element of defendants' violations of 18 U.S.C. § 1962. The Court of Appeals did not directly address this issue in this case, and Petitioners have not cited any case in which the issue was specifically addressed by any court. In *Armco,* however, the Fifth Circuit squarely decided the issue and held that reliance is not an element of a fraud-based RICO claim.

Armco, was an appeal by SLT Warehouse Company ("SLT") from a judgment entered on a jury verdict finding SLT liable to Armco Industrial Credit for violating 18 U.S.C. § 1962(c). SLT asserted, among other things, that the district court erred in refusing to instruct the jury "that Armco could be injured within the meaning of the RICO statute only if it justifiably relied to its detriment on the fraudulent statements comprising the predicate act mail fraud violation." Slip. Op. at 2939. The Fifth Circuit pointed out that SLT's argument confused mail fraud with common law fraud. While Armco was only obliged to prove the occurrence of acts of mail fraud as part of its RICO claim, SLT sought to require that Armco prove the elements of common law fraud. The court held that since reliance is not an element of the crime of mail fraud, the trial judge correctly refused to give the requested instruction. *Id.* at 2939-40.

The Fifth Circuit's succinct analysis of the issue and the absence of other authorities on point demonstrate that the issue is not of such importance that it should be addressed by this Court. Accordingly, the Petition should be denied.

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Terre Du Lac, Inc., Terre Du Lac Golf & Country Club, Inc., Terre Du Lac Country Club Association, a limited partnership, C.I.T. Corporation, Sensibar Enterprises, Inc., MO-ILL, Ltd., and James O. Kwon respectfully submit this reply brief in support of their petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

On February 7, 1986, the United States Court of Appeals for the Fifth Circuit issued its opinion in *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, No. 84-1828 (5th Cir., Feb. 7, 1986). In *Armco*, the Fifth Circuit agreed with the Eighth Circuit that detrimental reliance is not a necessary element of a fraud-based RICO claim.[1] The Fifth and Eighth Circuits are

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[1] Because the Fifth Circuit also held that Plaintiff failed to make a submissible case, however, *Armco* is unlikely to present an appropriate vehicle for this Court to resolve the issue.

thus aligned in square opposition to the Sixth Circuit, which has unambiguously held that detrimental reliance *is* an essential element of a fraud-based RICO claim:

> Where a corporation is defrauded bringing about ultimate bankruptcy, a cause of action exists on the part of the corporation against wrongdoer. Should the requisites of RICO be met, there may exist a federal cause of action on behalf of the corporation. Employees of the corporation who may incidentally lose their jobs do not have a fraud claim against the alleged wrongdoer.[2] Similarly, said employees do not have a claim under RICO simply because the acts of fraud satisfy 18 U.S.C. § 1961(1), thus raising the claim to a federal level.
>
> 2. In an action based on fraud one of the crucial elements is reliance. Employees of a defrauded corporation have no cause of action for fraud where they have not relied on the misrepresentation. See Restatement (Second) of Torts §533.

Warren v. Manufacturer's National Bank of Detroit, 759 F.2d 542, 545 (6th Cir. 1985).

Respondents acknowledge that this question presents an important issue of federal law that can be resolved in this case. Br. at 6. The recent action by the Fifth Circuit in *Armco* demonstrates the continuing confusion in the Circuits over this important issue, and the necessity of timely review by this Court.

Petitioners respectfully pray that a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

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